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Supreme Court, U.S.
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NO. 93-1918

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

EDDY LANKFORD,
Petitioner,

v.

JANE DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a public school teacher who sexually molested one of his female pupils, including during school hours and on school premises, was acting under color of state law for purposes of establishing a violation of 42 U.S.C. §1983.

2. Whether a public school principal may be held liable under 42 U.S.C. §1983 where he acted with deliberate indifference to a teacher's violations of a schoolchild's due process right not to be sexually molested.

3. Whether it was clearly established in the Fifth Circuit in 1987 that a public schoolchild had a substantive due process right not to be sexually molested by her teacher and that a public school official, with supervisory authority over the teacher, could be held liable under 42 U.S.C. §1983 for his deliberate indifference to that right.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-105a) is reported at 15 F.3d 443. The decision of the district

court (Pet. App. 108a-131a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. The petition for a writ of certiorari was filed on June 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. Respondent Jane Doe brought this suit in the United States District Court for the Western District of Texas against Taylor Independent School District, her ninth-grade biology teacher Lynn Stroud, school superintendent Mike Caplinger and principal Eddy Lankford (petitioner herein), alleging violations of, *inter alia*, 42 U.S.C. §1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. With respect to her Section 1983 claims, respondent alleged that Stroud had repeatedly sexually abused and harassed her in violation of rights guaranteed to her by the due process and equal protection clauses of the Fourteenth Amendment. She further alleged that petitioner and Superintendent Caplinger had actual or constructive knowledge of Stroud's misconduct and were deliberately indifferent to the violation of her rights.[1]

Petitioner received complaints from parents, teachers and students that Lynn Stroud, a teacher and coach at Taylor

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[1] The portion of the complaint quoted by petitioner (Pet. 5) omits paragraph 36 in which respondent alleged that petitioner "acted with deliberate and conscious indifference to [her] constitutional rights." Record on appeal, vol II, p. 584.

High School, engaged favoritism toward female students and inappropriate conduct of a sexual nature with female students. (Pet. App. 3a-5a). In May 1986, the school librarian reported to petitioner that she witnessed an incident of "child molestation" involving Stroud and two female students. (Pet. App. 5a). Petitioner made light of the incident and failed to warn or discipline Stroud or to document any of the complaints. (Pet. App. 5a-6a). In the fall of 1986, Stroud became respondent's ninth-grade biology teacher and "began his seduction of Doe by writing personal -- often suggestive -- comments on her homework and test papers." (Pet. App. 6a). Stroud began touching and kissing respondent, the first time with a kiss on her cheek as she was leaving the school field house. (*Ibid*). "Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house to engage in kissing and petting." (*Ibid*). He also called her out of other teachers' classrooms to engage in this behavior in the lab room. (Pet. App. 115a).

In early February 1987, petitioner learned that the assistant principal had seen Stroud acting inappropriately with some girls, including respondent, at a school basketball game. (Pet. App. 7a). About that time the school athletic director told petitioner that he spoke to Stroud about his suspicion that Stroud was "fooling around" with the "little old girls." Petitioner did not ask the athletic director what the basis of his suspicion was. (*Ibid*).

Around Valentine's Day 1987, Stroud gave respondent a valentine in class on which he wrote, "'To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever - for real - I love you.'" (Pet. App. 7a-8a).

Respondent's classmate, Brittani B., who had found the valentine, took it to petitioner who indicated that he was aware of rumors about Stroud and respondent and said "that Stroud merely had a way of flirting with the girls." (Pet. App. 8a). Petitioner's only action was to transfer Brittani out of Stroud's class. He did not investigate further or record this or any other incident involving Stroud. (*Ibid*).

Stroud eventually persuaded respondent to have sexual intercourse with him in March or April of 1987. (Pet. App. 8a). In the next several months, they had repeated sexual contact "at different locations, both on and off the school grounds." (Pet. App. 9a). In June 1987, petitioner was informed that two parents had complained to the school superintendent, Caplinger, about improper behavior between Stroud and respondent at a local fair. (*Ibid*).

In July 1987, respondent's parents informed Superintendent Caplinger that they had found photographs of Stroud with handwritten notes on the backs similar to those on the valentine. (Pet. App. 10a). Petitioner met with Stroud, who denied having a sexual relationship with respondent. For the first time, petitioner spoke of disciplinary measures, suggested to Stroud that he resign and subsequently told Stroud that he "would be fired 'if something was going on.'" (Pet. App. 11a). However, petitioner took no further action.

Although respondent was able to stay away from Stroud during the remainder of the summer, after school started petitioner "watched Stroud no more closely than he previously had," and Stroud resumed having sexual intercourse with respondent. (Pet. App. 11a). In October 1987, respondent's mother found more letters from Stroud and consulted with their family lawyer, to whom respondent

disclosed what had happened between her and Stroud. The attorney reported the abuse to Superintendent Caplinger, who on the same day received a complaint that Stroud had made unwelcome sexual advances toward another schoolgirl. Stroud was suspended and later pled guilty to criminal charges. (Pet. App. 11a-12a).

2. In a lengthy opinion, the district court denied the motions of petitioner and Superintendent Caplinger for summary judgment on their defense of qualified immunity. The district court held that the sexual molestation respondent suffered violated her clearly established constitutional right to be free from bodily harm and sexual harassment at school. Finding material factual issues in dispute, the district court held that while petitioner and the superintendent may not have had a duty to protect respondent, "they certainly had a duty to respond to the parents, teachers, students and fellow administrators' blatant protests against the offender's conduct." (Pet. App. 130a). The district court concluded that the evidence raised a reasonable question of fact as to whether the school officials "tolerate[d] Stroud's abuse to the point that they actually condoned the abuse. . . ." *Ibid.*

3. On interlocutory appeal a panel of the Fifth Circuit affirmed the denial of summary judgment on qualified immunity grounds and remanded the case for trial. 975 F.2d 137. The panel held that respondent "had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher. . . ." 975 F.2d at 138. The panel further held that both Superintendent Caplinger and Principal Lankford could be found liable based on the evidence of their deliberate indifference to a known pattern of misconduct by Stroud.

975 F.2d at 147-48.

4. This Court declined to review the panel opinion. *Caplinger and Lankford v. Doe*, __ U.S. __, 113 S.Ct. 1066 (1993). After Lankford and Caplinger's petition for a writ of certiorari was denied, the Fifth Circuit *sua sponte* ordered that the case be reheard *en banc*.

5. The court of appeals, sitting *en banc*, reversed the denial of immunity to superintendent Caplinger, but affirmed as to principal Lankford in an opinion authored by Judges Jolly and Davis in which six other judges joined. The court of appeals held that "schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right." (Pet. App. 2a). In a footnote, the court of appeals rejected the argument that Stroud had not been acting under color of state law, noting that "Stroud took full advantage of his position as Doe's teacher and coach to seduce her." (Pet. App. 17a n.4). The court of appeals further held that "school officials can be held liable for supervisory failures that result in the molestation of a schoolchild if those failures manifest a deliberate indifference to the constitutional rights of that child" and that these legal principles were clearly established in 1987. (Pet. App. 2a). The court adopted a three-part test, determining that school officials may be held liable in sexual abuse cases if the plaintiff establishes that:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subor-

dinate was sexually abusing the student; and

(2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and

(3) such failure caused a constitutional injury to the student.

(Pet. App. 23a). The court of appeals concluded that there was sufficient evidence under this standard to defeat petitioner's motion for summary judgment on his defense of qualified immunity, but that summary judgment should have been granted to Superintendent Caplinger.

Judge Higginbotham (joined by Judge Politz) wrote a separate concurring opinion, and six Judges dissented, with dissenting opinions authored by Judges Garwood and Jones, both of which were joined by all dissenters, and by Judge Garza.

ARGUMENT

The legal issues presented in this case are no different now than they were when this Court denied petitioner's first petition for a writ of certiorari, which was filed after the panel opinion. No intervening precedent has established a conflict in the circuits. Indeed, every court of appeals that has reviewed a case of sexual molestation of a schoolchild by a teacher or other public employee has agreed with the court of appeals (and the original panel) in this case that such abuse violates the child's Fourteenth Amendment

rights and that under 42 U.S.C. §1983 school officials can be held liable for their deliberate indifference to such abuse. *See Gates v. Unified School District No. 449*, 996 F.2d 1035, 1041 (10th Cir. 1993); *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725-27 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) (*Stoneking II*). *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990), *cert. denied*, 498 U.S. 1044 (1990). *Cf. J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 272-73 & n.4 (7th Cir. 1990). The courts of appeals' unanimous view of the law is correct and there is thus no reason for this Court to grant petitioner's second petition for a writ of certiorari.

To be sure, in applying these legal principles, the courts of appeals came to varying conclusions about whether the public school officials before them should have been granted qualified immunity under the particular facts of each case. Similarly, the court of appeals in this case after very carefully reviewing the facts concluded that there was sufficient evidence to present the issue of petitioner's qualified immunity to a jury, but that Superintendent Caplinger was entitled to summary judgment. As will be shown below, most of petitioner's arguments essentially challenge the court of appeals' factual determination that there is sufficient evidence in this case, when viewed in the light most favorable to respondent, from which a jury could find that petitioner is liable under 42 U.S.C. §1983. In so arguing, petitioner inappropriately resolves factual disputes in his favor, and in any event, such factual issues do not warrant review by this Court, particularly on interlocutory

appeal at the summary judgment stage.

1. Petitioner first argues that Coach Stroud's sexual abuse of respondent "which occurred outside of school hours or any school related activity" (Pet. 10) was not under color of state law.[2] Contrary to petitioner's allegations, however, Stroud sexually molested respondent during school hours over a period of several months when he "took Doe from his classroom to an adjoining lab room where he kissed and petted her." (Pet. App. 17a n.4). Indeed, Stroud harassed, molested and abused respondent in connection with school activities and on school property on untold occasions over the course of almost a year. *See* Pet. App. 6a-7a, 9a, 17a n.4.

Thus, this case is not in conflict with *D.T. by M.T. v. Independent School District No. 16* because, as the court of appeals recognized (Pet. App. 17a n.4), the facts of this case are radically different from those in *D.T. by M.T.*. In that case, the Tenth Circuit found that a teacher had not acted under color of state law when he abused children during the summer on a private fund-raising trip unrelated to the school and when he had no contractual obligations to the district. 894 F.2d at 1182-83, 1187-88. In this case respondent was victimized during the school year and at times even during class hours and on campus, thus creating the nexus to state action that was lacking in *D.T. by M.T.*. Moreover, there is

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[2] Petitioner argues that Stroud must have been acting under color of state law in order for respondent to state a violation of 42 U.S.C. §1983. However, it is undisputed that petitioner was acting under color of state law, and that is all that is necessary to hold him liable for his deliberate indifference and tacit condonation of Stroud's sexual harassment and sexual abuse of students on school property, during school hours and in connection with school events. *See Black by Black v. Indiana Area School District*, 985 F.2d 707, 711 (3d Cir. 1993).

no conflict in the legal standards applied by the Tenth Circuit and the court of appeals in this case: both courts used a similar legal analysis for determining whether a teacher acted under color of state law, but the courts came to different conclusions based on the particular facts of each case.

Petitioner contends that Coach Stroud was not acting under color of state law because he was not authorized to sexually molest his students. If this argument were accepted, students who are sexually abused by a teacher in connection with school attendance could rarely, if ever, make a claim under 42 U.S.C. §1983, because it is unlikely that such misconduct will ever be authorized by the state. Moreover, as Judge Higginbotham pointed out (Pet. App. 41a), this Court put such arguments to rest in *Monroe v. Pape*, 365 U.S. 167 (1961), where police officers broke into a home in violation of state law and the state constitution. The Court rejected the argument that the "under color of state law" requirement of Section 1983 was not met because the acts were unauthorized and because state law provided a remedy. The Court held that Congress "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S. at 172. In this case Stroud abused his position by sexually molesting respondent during the course of carrying out his official duties and by "us[ing] his position of authority to pressure and manipulate Doe into sex . . . ." (Pet. App. 36a (J. Higginbotham, concurring)).[3] The court of appeals'

[3] Relying on Judge Garza's lone dissent, petitioner seems to argue that if a state official exceeds his authority in areas where he has some authorization a Section 1983 claim can be made out, but no claim will lie if the official has no authorization whatsoever. Thus, petitioner argues, Stroud had no authority to sexually molest respondent, therefore he did

holding that Stroud acted under color of state law is correct and in accord with the decisions of this Court and other courts of appeals. *See Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir. 1991)(a state employee who was responsible for finding employment for refugees was acting under color of state law when he raped refugee women at, among other places, motels to which he took them); *see also Stoneking II*, 882 F.2d at 722, 726-27 (band director's sexual molestation of a student violated her clearly established constitutional rights although some of the acts of abuse occurred in his car or in his house).

2. a) The deliberate indifference standard endorsed by the court of appeals is consistent in all significant respects with the standards articulated by the other courts of appeals to have addressed the issue of when a school official can be held liable for a subordinate's acts of sexual abuse. *See Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d at 645 (personal liability is established where the school official "1) Received notice of a pattern of unconstitutional acts committed by subordinates; 2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts; 3)

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not abuse his authority and could not be said to have acted under color of state law for Section 1983 purposes. As Judge Higginbotham pointed out, this analysis conflicts with *United States v. Price*, 383 U.S. 787 (1966), where law enforcement officers, among others, were found to have acted under color of state law when they conspired to murder civil rights workers, an act clearly outside their authority. Furthermore, Judge Garza's approach depends solely on how actions are characterized and they can often be characterized either as unauthorized or as exceeding granted authority. For example, one can say that Stroud had authority to take respondent into the lab room and perhaps even to touch her in the course of guiding her in a biology experiment. He, therefore, abused his authority when he took her into the lab room for a sexual encounter and touched her there in sexual ways, just as the officials in *Price* abused their authority when they plotted to kill the civil rights workers.

Failed to take sufficient remedial action; and 4) . . . such failure proximately caused injury to the children"); *Gates v. Unified School District No. 449*, 996 F.2d at 1041 (same); *Stoneking II*, 882 F.2d at 725 (school officials may be held liable based on "policies maintained in deliberate indifference to actions taken by subordinates"). *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d at 1193 (court recognized that liability could be predicated on school officials' deliberate indifference to constitutional rights, but found insufficient evidence of deliberate indifference). *Cf. J.O. v. Alton Community Unit School District 11*, 909 F.2d at 272-73 & n.4 (suggesting that the court would find liability where school officials promulgated policies that fostered child abuse). All these courts recognize that a deliberate failure to act to prevent sexual abuse can result in liability.

Nevertheless, petitioner quibbles with the deliberate indifference standard as applied in this case because, he argues, it contains no element of affirmative conduct. However, a deliberate refusal to act, where a supervisor has an obligation to act and where his actions could prevent injury, constitutes conduct. A supervisor in such a situation should not be able to escape liability merely on the ground that he shirked his responsibility and did nothing. As Judge Higginbotham explained, an "egregious failure [by petitioner] to fulfill [his] obligation to oversee Stroud's behavior would amount to action on [his] part." (Pet. App. 45a). An egregious failure to act after notice of improprieties also amounts to tacit authorization and condonation of that misconduct.

Moreover, petitioner again improperly resolves factual disputes in his favor when he argues that this case involves mere "inaction" and no "'communication of condonation or

authorization.'" (Pet. 15-16). To the contrary, petitioner took action which showed that he condoned Stroud's behavior. For example, in response to Brittani B.'s complaint about Stroud's valentine, petitioner took action -- he transferred Brittani out of Stroud's class thereby sending the clear signal that those who raised the issue of inappropriate behavior would suffer consequences. Petitioner also took action when he responded in a flippant and derisive manner to Brittani B., the librarian and others who brought Stroud's inappropriate behavior to his attention. Thus, contrary to petitioner's contentions, this case is very much like *Stoneking II* and the other cases he cites (Pet. 17) in which a supervisor demonstrates tacit condonation of the offensive conduct. *See, e.g., Stoneking II*, 882 F. 2d at 730-31 (principal and assistant principal who "discouraged and minimized reports of sexual misconduct by teachers" were not entitled to summary judgment because a jury could find that "such discouragement amounted to a communication of condonation of the teacher's behavior").[4]

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[4] In *Rizzo v. Goode*, 423 U.S. 362 (1976), on which petitioner relies, the Court held that a district court could not impose on a city police department a comprehensive program for handling citizen complaints of police misconduct solely because police officials had not themselves responded to statistics showing a pattern of police violations of rights. That case is factually different from this case, and among other things the decision turned on the fact that the defendant officials were not "causally linked" to the violations. 423 U.S. at 606. The standard adopted by the court of appeals in this case requires that causation be established before a school official can be held liable for injuries caused by a subordinate's misconduct. (Pet. App. 23a). After reviewing the summary judgment evidence, the court correctly ruled that there was sufficient evidence of causation here to present the issue to the jury. Not only were there affirmative action and statements which indicated that petitioner condoned Stroud's inappropriate conduct with young girls, but "[a] jury could reasonably conclude that had Lankford taken actions that were obviously necessary in response to the valentine --

b) Contrary to petitioner's contention, the notice requirement articulated by the court of appeals in this case is also like that adopted by other courts of appeals. Under the Fifth Circuit's standard, to hold a supervisory school official liable for the acts of a subordinate the defendant must have *"learned of facts or a pattern of inappropriate sexual behavior by a subordinate* pointing plainly to the conclusion that the subordinate was sexually abusing the student." (Pet. App. 23a, emphasis added). Other courts have simply required "notice of a pattern of unconstitutional acts committed by a subordinate . . . ." *Jane Doe A v. Special School District*, 901 F.2d at 645. *See also Stoneking II*, 882 F.2d at 724-25 (alleged "reckless indifference to instances of known *or suspected* sexual abuse of students by teachers" (emphasis added)). The notice to petitioner in this case -- including a very suggestive handwritten valentine, suspicions by the athletic director that Stroud was "fooling around" with the girls and a complaint of "child molestation" by the librarian -- clearly satisfies the Eighth Circuit's notice requirement. Correspondingly, the complaints in *Jane Doe A* that the bus driver used profanity and also kissed a small child on the bus do not necessarily point plainly to sexual abuse so as to satisfy the Fifth Circuit's standard. Accordingly, contrary to petitioner's argument, the results in this case and in the *Jane Doe A* case would be the same regardless of which articulation of the notice requirement is used. The inconsequential variations in the wording used by the Eighth and the Fifth Circuits do not require this Court's review, particularly since the evidence of notice in this case

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indeed, if he had responded at all -- the relationship might have been derailed at that point and the violation of Jane Doe's rights would not have been as severe or prolonged." (Pet. App. 29a).

would be sufficient to overcome summary judgment under either court's wording of the notice requirement.

3. The court of appeals decision that the legal principles it recognized were clearly established in 1987 also does not require review. It is consistent with other appellate decisions, most notably *Stoneking II*, in which the Third Circuit denied qualified immunity to a principal and assistant principal at the summary judgment stage, holding that a student's right to be free from sexual abuse was clearly established even before 1977 and that reasonable officials would have understood this. 882 F.2d at 727. Furthermore, in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit had previously held that a principal was not entitled to dismissal on qualified immunity grounds in a case involving injury to a student by a teacher because it had been clearly established in 1985, when the acts at issue there took place, that the due process clause protects a school child from unjustified bodily injury by a teacher. This same legal principle is applicable in this case.

As Judge Higginbotham cogently explained:

> This is a case about power and its abuse. The state conferred the power and Stroud abused it. That Coach Stroud exceeded the constitutional limits of his authority, and that Principal Lankford caused a violation of Doe's rights by looking away, are truths too plain to admit of uncertainty, legal or otherwise. We have never understood the Fourteenth Amendment to permit such a misuse of power."

(Pet. App. 34a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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